

***United States Court of Appeals
for the Second Circuit***

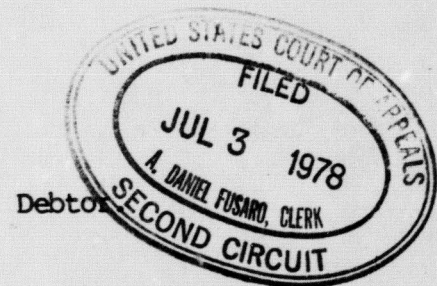


**PETITION FOR
REHEARING
EN BANC**

77-5019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of
STIRLING HOMEX CORPORATION,



GREGORY JEZARIAN, GERALDINE JEZARIAN, LONETOWN COMPANY,
HARRY E. JONES, ALECK GOLDBERG, as Custodian for MARK
GOLDBERG, and MRS. D. WINDSOR DIXON,

Appellants,

FRANK G. RAICHLE, Reorganization Trustee; LINCOLN FIRST
BANK OF ROCHESTER; CHEMICAL BANK; THE CHASE MANHATTAN
BANK, N.A.; THE FIRST NATIONAL BANK OF CHICAGO; MARINE
MIDLAND BANK; THE TRAVELERS INDEMNITY COMPANY; and THE
SECURITIES AND EXCHANGE COMMISSION,

Appellees.

Appeal from the United States District Court for the
Western District of New York

PETITION OF THE SECURITIES AND EXCHANGE COMMISSION,
APPELLEE, FOR REHEARING AND SUGGESTION FOR REHEARING
IN BANC

ORIGINAL
(AFFIDAVIT
OF SERVICE)

DAVID FERBER
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Securities and Exchange Commission
Washington, D.C. 20547

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-5019, 77-5022

In the Matter of
STIRLING HOMEX CORPORATION,

Debtor.

GREGORY JEZARIAN, GERALDINE JEZARIAN, LONETOWN COMPANY,
HARRY E. JONES, ALECK GOLDBERG, as Custodian for MARK
GOLDBERG, and MRS. D. WINDSOR DIXON,

Appellants,

FRANK G. RAICHLE, Reorganization Trustee; LINCOLN FIRST
BANK OF ROCHESTER; CHEMICAL BANK; THE CHASE MANHATTAN
BANK, N.A.; THE FIRST NATIONAL BANK OF CHICAGO; MARINE
MIDLAND BANK; THE TRAVELERS INDEMNITY COMPANY; and THE
SECURITIES AND EXCHANGE COMMISSION,

Appellees.

Appeal from the United States District Court for the
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PETITION OF THE SECURITIES AND EXCHANGE COMMISSION,
APPELLEE, FOR REHEARING AND SUGGESTION FOR REHEARING
IN BANC

The Securities and Exchange Commission, a party to this appeal,
respectfully files this petition for rehearing and suggestion for re-
hearing in banc. The reasons therefor are more fully detailed in the

petition of appellants Jezarian, et al., which is being filed on this day. They are:

1. The holders of the fraud claims that have been subordinated are creditors within the meaning of Chapter X of the Bankruptcy Act, as conceded by the district judge and assumed (arguendo) by this Court (Slip op. 3525-3526).

2. In Pepper v. Litton, 308 U.S. 295 (1939), relied on by this Court (Slip op. 3526)), and in reorganization cases of which we are aware where the equitable doctrine of subordination has been discussed and applied, the subordination flowed from the wrongdoing or sharp practices of the holders of the claims or their predecessors in interest.

3. The only Supreme Court decision of which we are aware involving a situation parallel to that in this case, Oppenheimer v. Harriman National Bank & Trust Co., 301 U.S. 206 (1937), held that creditors whose claims arose from a debtor's fraudulent sales of its stock to them should participate in a liquidation on a parity with other creditors; in the instant case, although the fraud claims are accorded creditor status under Chapter X, they are subordinated to other claims.

4. The pending legislation on which this Court relies (Slip op. 3531-3532) suggests the understanding of the Congressional committees that the existing law is contrary to the holding of this Court. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 194-196 (1977).

5. The Slain and Kripke article, upon which this Court relies (Slip op. 3530), suggests that where other creditors made loans prior to the investment of capital by defrauded shareholders, as occurred here

with respect to the \$20,000,000 invested by the preferred shareholders, the prior creditors "should be required to sustain the burden of their detrimental reliance." 48 N.Y.U L. Rev. at 289. To do so here the bank creditors would be required to show their reliance on an equity cushion that had not yet been supplied.

WHEREFORE, we urge that any determination by this Court that fraud claims arising from sales of the debtor's stock are to be equitably subordinated to other claims should be limited to the particular circumstances involved in each case. In the absence of Congressional action, there should be no automatic rule of subordination that might arguably be applied whenever stockholders' fraud claims are asserted, either before or after judgment.

Respectfully submitted,

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July 3, 1978



OFFICE OF THE
GENERAL COUNSEL

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

July 3, 1978

A. Daniel Fusaro, Esquire
Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: In re Stirling Homex Corporation, Debtor;
Gregory Jezarian, et al., Appellants,
Nos. 77-5019 and 77-5022 (consolidated)

Dear Mr. Fusaro:

Enclosed for filing with the Court are ten copies of
the Commission's petition for rehearing and suggestion for
rehearing in banc.

I also certify that I have caused one copy of the petition
to be mailed to all counsel listed below.

Sincerely,

Irving H. Picard
Assistant General Counsel

Enclosures

Copies to:

Robert Block, Esquire, Pomerantz Levy Haudek & Block
Milberg Weiss Bershad & Spechtrie
Nixon, Hargrave, Devans & Doyle
Zalkin, Rodin & Goodman
Bader & Bader
Johnson, Reif & Mullan
Frank G. Raichle, Esquire
Phillips, Lytle, Hitchcock, Blaine & Huber
Brown, Kelly, Turner, Hassett & Leach
Milbank, Tweed, Hadley & McCloy